Supreme Court of the United States

OCTOBER TERM, 1924

No. 733

BLAKELY D. McCAUGHN, Collector of Internal Revenue,
Plaintiff-in-error,

vs.

CHARLES H. LUDINGTON,
Defendant-in-error.

IN ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MEMORANDUM OF PLAINTIFF BELOW IN SUPPORT OF THE APPLICATION BY THE COLLECTOR OF INTERNAL REVENUE FOR A WRIT OF CERTIORARI.

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The defendant below, the Collector of Internal Revenue, now applies to the court for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit to review a decision of that court reversing the judgment of the District Court in favor of the Collector and awarding a new trial, and the defendant concurs in the view that the important question of statutory interpretation should be now reviewed by this court.

The question passed upon in both courts below was one of law, as the opinions clearly show. If the question of law was rightly decided by the District Court, the defendant below was entitled to judgment. If, on the other hand, it was rightly decided by the Circuit Court of Appeals, the plaintiff was entitled to judgment. The new trial directed by the court can, therefore, in this case amount to nothing more than the formal enforcement of the mandate of the Circuit Court of Appeals, a perfunctory new trial and a final judgment entered thereon as matter of course. It would then be necessary for the Collector of Internal Revenue to sue out a writ of error to the Circuit Court of Appeals for the Third Circuit, and that court would thereupon, of course, affirm the judgment, also as a matter of course in view of its ruling on the present writ. Hence that proceeding would in fact be also merely *pro forma*.

It is manifest from the foregoing considerations that no useful purpose can be served by postponing review of the decision of the Circuit Court of Appeals by this court, which alone can finally and authoritatively settle the question of statutory interpretation involved.

The question of law thus presented is adequately stated in the petition for the writ of certiorari and the accompanying papers heretofore filed with the court by the Department of Justice on behalf of the Collector of Internal Revenue; it has been differently decided by different courts of inferior jurisdiction, and it is important to the due and prompt administration of justice that an authoritative decision be pronounced by this court as soon as may be.

This court, of course, has power to issue its writ of certiorari to the Circuit Court of Appeals to the end that the cause may be brought here at once. The fact that the judgment of the Circuit Court of Appeals is interlocutory clearly does not constitute a bar to such a procedure. *Forsythe* v. *Hammond*, 166 U. S. 506; *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, 408-9; *Hamilton Shoe Co.* v. *Wolff Bros.*, 240 U. S. 251, 258. The judgment here is only interlocutory in form; in effect it is final. Further proceedings upon it would only result in unnecessary proceedings, expense and delay, and, in the meanwhile, leave the law in a state of uncertainty as to an important question in the administration and enforcement of the revenue laws.

It is submitted that it is to the interest, not only of the Government, but of the individual taxpayers as well, that such a question of national and general importance be promptly set at rest.

The question now before the court in the case of *Flannery* v. *United States*, on appeal from the Court of Claims, is similar to, but not the same as, the question involved herein. In the case at bar the taxpayer sold the securities at less than their cost to him, which was in turn less than their value on March 1, 1913. In the Flannery case, however, the taxpayer sold the securities at more than cost, but less than their value on March 1, 1913. In order that all the phases of the situation affecting the tax statute in question may be adequately before the court, it is believed that it will be helpful and in the interest of justice if this case as well as the Flannery case be heard by the court.

For the foregoing reasons the defendant joins in the application for a writ of certiorari and prays that the writ may issue to the Circuit Court of Appeals for the Third Circuit, as prayed for.

Respectfully submitted,

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